

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

No. 7:12-CR-00028-F-1  
No. 7:13-CV-00164-F

TIMOTHY GAINNEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	<u>ORDER</u>
	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

This matter is before the court on Timothy Gainey's Motion to Withdraw his § 2255 motion [DE-43]. Gainey argues that he would like to be able to dismiss his § 2255 without prejudice to him to re-file at a later date.

A review of the record reveals that Gainey filed his § 2255 motion [DE-38] on August 2, 2013. On August 5, 2013, the undersigned entered an order [DE-40] advising Gainey that his § 2255 motion was not filed on the appropriate form. Gainey was given fourteen days within which to complete the proper form and re-submit his § 2255 motion.

Rule 41(a)(1)(A)(I) of the Federal Rules of Civil Procedure applies to voluntary dismissals and provides that an action may be dismissed without an order of the court by filing a notice of dismissal at any time before the opposing party serves an answer or files a motion for summary judgment. In this case, the Government has not responded to Gainey's § 2255 motion.

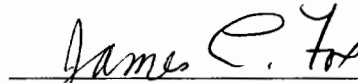
Although Gainey is entitled to voluntarily dismiss his § 2255 action, he should be aware of the following: Section 2255(f) establishes a one-year period of limitation for § 2255 motions. In most cases, the one-year period generally runs from the date upon which the conviction became final. *See* 28 U.S.C. § 2255(f). A dismissal without prejudice will not excuse Gainey

from compliance with the one-year period of limitation. Moreover, while a voluntary dismissal of a § 2255 motion is not an adjudication on the merits, *see United States v. Sosa*, 364 F.3d 507, 510 n.2 (4th Cir. 2004), Gainey is advised that the fact that his § 2255 motion is dismissed without prejudice does not necessarily preclude a determination that a subsequently filed motion is untimely or otherwise procedurally barred.

For the foregoing reasons, Gainey's Motion to Withdraw his § 2255 motion [DE-43] is ALLOWED, and his § 2255 motion [DE-38] is DISMISSED without prejudice.

SO ORDERED.

This the 23<sup>d</sup> day of August, 2013.

  
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James C. Fox  
Senior United States District Judge